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ABSTRACTS OF RECENT AMERICAN DECISIONS.

*Supreme Court of Alabama.*¹

Acts of Congress, Construction of—Judiciary act of 1789, thirty-third section not unconstitutional.—The thirty-third section of the judiciary act of 1789, (which empowers justices of the peace and other officers therein named, to arrest and commit, or bail, as the case may require, persons charged with a violation of the criminal law of the United States,) is not unconstitutional, the authority thereby conferred on justices of the peace, is not “*judicial power*,” within the meaning of the third article of the United States Constitution, nor does the exercise of it make them federal officers within the second clause of the second section of the second article. *Gist, ex parte.*

Act of May 8th, 1822, “confirming claims to lots in Mobile,” &c.—The act of May 8th, 1822, “confirming claims to lots in Mobile,” &c., confirms only those claims “which in the opinion of the commissioner, ought to be confirmed,” and the commissioner’s report on which the act is based, only recommends for confirmation of all the claims embraced in his register, No. 11, “the claims to such lots as were inhabited and cultivated under the Spanish government, or such as were built upon by permission of the Spanish authorities.” Therefore a claim to a lot which was inhabited and cultivated by one of the claimant’s ancestors while Mobile was under the dominion of Great Britain, though included in the commissioner’s report, does not come within the provisions of the act of confirmation, when it is shown that the mansion house, with all the improvements, was burned down during the siege of Mobile by the Spaniards in 1780; and there is no proof of any subsequent inhabitation or cultivation under Spain. *Kennedy’s Ex’rs vs. Rochon’s Heirs.*

Agency—When principal bound by contract of agent—General rule—Bill of Lading an exception.—The general rule is, that to hold the principal personally liable on a written contract made by his agent, it must be executed in the name of the principal and appear to be his contract; but one of the several exceptions to this rule is, that a bill of lading signed by the master of a vessel in his own name, in the usual course of employment of the vessel, will bind the owner. *McFyer vs. Steele.*

¹ Furnished us by the Reporter, J. W. SHEPHERD, Esq., from the 26th volume of Alabama Reports, just published.

Agency—Writing under seal held binding only on agent.—A sealed instrument in these words, "Twenty days after date I promise to pay to J. T., or order, \$442, value received. Given under my hand and seal," &c., and signed "B. W. (seal), agent for C. C." *Held*, the obligation of the agent only, and therefore not admissible evidence against C, when unaccompanied with the offer of extraneous explanatory proof. *Dawson vs. Cotton.*

Agency—When promise of indemnity will be implied against principal, for illegal act of agent.—When an agent is employed by his principal to do an act which is not manifestly illegal, and which he does not know to be wrong, (as to take personal property, which though claimed adversely by another, he has reasonable grounds to believe belongs to his principal,) the law implies a promise of indemnity by the principal for such losses and damages as flow directly and immediately from the execution of the agency. *Moore vs. Appleton.*

Common Carriers—Giving through tickets does not make partners.—If the several proprietors of different portions of a public line of travel, by agreement among themselves, appoint a common agent at each end of the route to receive the fare and give through tickets, this does not *per se* constitute them partners as to passengers who purchase through tickets, so as to render each one liable for losses occurring on any portion of the line. *Ellsworth vs. Tartt.*

Contracts—Impossible considerations.—One who contracts with a workman for services within his art or calling, has a right to rely upon his representations as to his skill; and although the law will not seek to compel a man to do that which is impossible, yet it will not allow the workman, after he has obtained money as the price of stipulated services which he cannot perform, by false and fraudulent representations as to his skill in his business, to defeat a recovery for the deceit and consequent injury by setting up the impracticability of those services. *McGar vs. Williams.*

Contracts—Rescission—Tender must be continuous.—If the vendor refuses to accept the property when the purchaser offers to return it, this will dispense with a more formal tender; but the purchaser, if he still retains the property in his possession, must yield it up on the reasonable demand of the vendor, and his refusal to surrender on such demand, even after suit brought, will destroy the effect of his previous tender. *Bennett vs. Fail & Patterson.*

Contracts—Guaranty and original contract.—Plaintiff having agreed with S and P, who were mail contractors, to keep their drivers and horses at a

stipuated sum per annum, payable quarterly ; and during the last quarter on their becoming insolvent, having refused to continue the performance of his contract without security ; thereupon defendant, at the request of S and P, wrote to plaintiff, saying " I will see you paid for this quarter, as their time then expires, payable when due in Alabama bank notes." Plaintiff kept the drivers and horses until the expiration of the quarter, and the agent of S & P afterwards closed their account, by giving the note of the surviving partner, payable one day after date ; which was filed as a claim against the estate of the deceased partner. *Held*, that defendant's promise was not a guaranty, but an original undertaking, upon a new and sufficient consideration which upon its acceptance by plaintiff, discharged the debt of S & P, and bound defendant to pay, at the expiration of the quarter, in Alabama bank notes. *Jolley vs. Walker's Adm'rs.*

Contracts—Hiring of slaves—Right of punishment delegated to hirer—Punishment must not be cruel nor barbarous.—In the absence of an express stipulation, the owner delegates to the hirer the same right to punish his slave which he himself has ; but if the punishment inflicted by the hirer, when considered with a just regard to all the attendant circumstances, is either cruel or barbarous, he becomes a trespasser, *ab initio* and is liable to damages at the suit of the owner. *Nelson vs. Bondurant.*

Contracts—Mutual mistake of fact does not affect validity—Concealment of immaterial fact, no fraud.—If the parties to a pending suit, under the mistaken impression that the costs have been adjudged against the defendant, enter into a verbal contract, by which the plaintiff binds himself to pay the costs in the first instance, and the defendant promises to repay them, and also to pay the note on which the suit is founded, and which he admits to be just, in good accounts due the first day of January, next thereafter, the promise is binding, and its validity is not affected by the mistake ; and if the plaintiff, on the verbal agreement being afterwards reduced to writing, fails to inform the defendant of the mistake, and conceals from him the fact (which he had himself discovered, and of which he knew the defendant was still ignorant,) that he had been compelled to take a non-suit, this does not amount to fraud, nor enable the defendant to avoid the written contract. *Eastman vs. Hobbs.*

Criminal law—Right of trial by jury.—The constitutional guaranty of a trial by jury " in all prosecutions by indictment or information," (Const. of Ala., art. I, § 10,) does not apply to offences created by statute since the adoption of the constitution, except in the specified cases ; but it is

within the power of the legislature to make such offences triable before a justice of the peace without indictment; nor does the provision contained in the twenty-eighth section of the same article, which declares, that "the right of trial by jury shall remain inviolate," extend the right of trial by jury to cases which were unknown at the adoption of the constitution, both to the common and to the statute law. *Tims vs. The State.*

Criminal Law—Unauthorized discharge of jury equivalent to acquittal.—The constitutional guaranty of a trial by jury "in all criminal prosecutions," includes the right to have the deliberations of the jury continued when once they have begun the trial and heard a portion of the evidence, until the occurrence of a sufficient legal reason for their discharge, and the chance of acquittal at their hands during all that time; and therefore the unauthorized discharge of a jury in any criminal case, either for a felony, or for a misdemeanor, is equivalent to an acquittal. (Chilton C. J., expressing no opinion). *McCauley vs. The State.*

Criminal Law—Demurrer to evidence, object and effect of.—The object of a demurrer to evidence is, not to substitute the judge for the jury as a trier of the facts, but to ascertain the law upon an admitted state of facts, and its effect when issue is joined, is to admit every fact which the evidence tends to establish. *Bryan vs. The State.*

Criminal Law—Demurrer to evidence not allowed except by consent.—In criminal prosecutions, neither party can be permitted, except by mutual consent, to withdraw the trial from the jury to the court by a demurrer to the evidence. *Brister vs. The State.*

Criminal Law—Homicide not excusable when committed to prevent a trespass.—While every citizen has the right to resist any attempt to put an illegal restraint upon his liberty, his resistance must not be in enormous disproportion to the injury threatened, he has no right to kill to prevent a mere trespass, which is unaccompanied by any imminent danger of great bodily harm or felony, and which does not produce in his mind a reasonable belief of such danger. *Noles vs. The State.*

Damages—In cases of collision, when both vessels are in fault.—The general rule of the common law is, that if both vessels are in fault, neither can recover damages for injuries caused by the collision; but this rule applies only to faults which operated directly and immediately to produce the collision. *Owners of steamboat Farmer vs. McCraw.*